

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SULAYMAN SARR,

Petitioner,

v.

IMMIGRATION AND CUSTOMS
ENFORCEMENT FIELD OFFICE
DIRECTOR,

CASE NO. 2:24-cv-01293-RAJ-BAT

**REPORT AND
RECOMMENDATION**

Petitioner Sulayman Sarr is currently detained by United States Immigration and Customs Enforcement (“ICE”) at the Northwest ICE Processing Center (“NWIPC”) in Tacoma, Washington. Dkt. 6. Petitioner has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 seeking release from detention or, in the alternative, a bond hearing. *Id.* at 1, 41. Petitioner also appears to include a request for a temporary restraining order (“TRO”) in the body of his petition. *Id.* at 33-36. The Government has filed a return memorandum and motion to dismiss along with a supporting declaration and exhibits. Dkt. 9. Petitioner has filed a response opposing the motion to dismiss along with several supporting declarations. Dkts. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22.

Petitioner has also filed a motion to substitute the Respondent. Dkt. 12. The Government did not file a response to that motion.

1 Having considered the petition, the Government's motion, the briefs, and exhibits
2 submitted by the parties, and the balance of the record, the Court recommends that the
3 Government's motion to dismiss (Dkt. 9) and Petitioner's federal habeas petition (Dkt. 6) should
4 be GRANTED in part and DENIED in part. Specifically, the Court recommends that Petitioner's
5 request for release should be DENIED but that his request for a bond hearing should be
6 GRANTED. Petitioner's request for a TRO (Dkt. 6) should be DENIED as moot. The Court
7 further recommends that Petitioner's motion to substitute (Dkt. 12) be GRANTED and that
8 Bruce Scott, the warden of NWIPC, be substituted as the Respondent in this action.

9 BACKGROUND

10 Petitioner is a native and citizen of Gambia, who arrived in the United States in 2007.
11 Dkt. 9-2 (Record of Deportable, Inadmissible Alien) at 1. On July 29, 2021, Petitioner was
12 convicted of felony conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§
13 841(a)(1), 846, and was sentenced to two years in federal prison by the United States District
14 Court for the District of Utah. *Id.* at 1-2.

15 On February 1, 2023, Petitioner was released from federal prison and taken into custody
16 by the Department of Homeland Security (DHS) on the basis that he was a criminal noncitizen
17 (having committed an aggravated felony relating to drug trafficking and a drug conviction) and
18 was subject to removal based on administrative charges warranting mandatory detention. Dkt. 9-
19 2 at 1-2; Dkt. 9-3 (Notice to Appear, dated February 1, 2023) at 1-4; 8 U.S.C. § 1226(c); Dkt. 9-7
20 (Immigration Judge (IJ) Order of Removal, dated Aug. 30, 2023) at 1-2. Petitioner subsequently
21 admitted that he was removable as a criminal noncitizen pursuant to 8 U.S.C. §§
22 1127(a)(2)(A)(iii) and 1127(a)(2)(B)(i). Dkt. 9-7 (IJ Order of Removal, dated Aug. 30, 2023) at
23 1-2.

1 On February 14, 2023, Petitioner appeared in Immigration Court for a removal hearing.
2 Dkt. 9-4 (Immigration Removal Hearing, dated Feb. 14, 2023). At the hearing Petitioner
3 requested and was granted a continuance in order to seek counsel. *Id.* at 17. On March 7, 2023,
4 Petitioner appeared in Immigration Court and requested and was granted a continuance to seek
5 counsel and to prepare his documents. Dkt. 9-5 (Immigration Removal Hearing, dated Mar. 7,
6 2023) at 2, 8-9. On March 28, 2023, Petitioner appeared in Immigration Court and requested and
7 was granted a continuance to April 18, 2023, in order to obtain some supporting documents for
8 his application for asylum. Dkt. 9-6 (Immigration Removal Hearing, dated Mar. 28, 2023) at 2-5.

9 Petitioner subsequently applied for “asylum and withholding of removal under sections
10 208(b)(1)(A) and 241(b)(3)(A) of the INA, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A), and
11 protection under the regulations implementing the Convention Against Torture (“CAT”).” Dkt.
12 9-8 (Board of Immigration Appeals (“BIA”) Final Order of Removal, dated Jan 18, 2024) at 1;
13 Dkt. 9-7 at 2. On August 30, 2024, the IJ issued an order denying Petitioner’s requests for relief,
14 protection, and deferral and ordering Petitioner removed. Dkt. 9-7 at 3-10; Dkt. 9-8.

15 Petitioner appealed the IJ’s order of removal to the Board of Immigration Appeals
16 (“BIA”). Dkt. 9-8. On January 18, 2024, the BIA dismissed the appeal, finding Petitioner had not
17 challenged the IJ’s determination that he was convicted of a particularly serious crime and was
18 thus ineligible for “asylum, statutory withholding of removal, and withholding of removal under
19 the CAT”, affirming the IJ’s denial of the Petitioner’s request for deferral of removal under the
20 CAT, and issuing a final administrative order of removal. *Id.* at 1-3.

21 On February 14, 2024, Petitioner appealed the final administrative order of removal by
22 filing a petition for review with the Ninth Circuit Court of Appeals under case number 24-791.
23 Dkt. 9-9 (9th Cir. Dkt. No. 24-791, PACER Sheet); *Sarr v. Garland*, No. 24-791 (9th Cir. filed

1 Feb. 14, 2024). Petitioner also filed a motion for temporary stay of removal which was granted
2 by the Ninth Circuit pursuant to General Order 6.4(c). Dkt. 9-9 at 3; *Sarr v. Garland*, No. 24-791
3 (9th Cir. filed Feb. 14, 2024). The Ninth Circuit issued a scheduling order setting deadlines to
4 complete briefing by June 3, 2024. *Id.* Petitioner moved for appointment of counsel and on May
5 28, 2024, the Ninth Circuit granted the motion and subsequently vacated the briefing schedule.
6 *Id.*

7 The Government filed opposition to Petitioner's motion for a stay of removal and moved
8 to dismiss the case. *Id.* On October 22, 2024, the Ninth Circuit Court of Appeals issued an order
9 granting the Government's motion and dismissing Petitioner's appeal on the grounds that the
10 BIA's January 18, 2024, decision was vacated by a subsequent decision by the BIA issued on
11 February 14, 2024. *See Sarr v. Garland*, No. 24-791 (9th Cir. filed Feb. 14, 2024), ECF 19.

12 Petitioner indicates in his petition that he filed a motion to reopen removal proceedings
13 after the BIA issued its January 18, 2024, decision on the grounds that he was never issued a
14 briefing schedule or transcript for his initial appeal of the IJ's decision. Dkt. 6 at 16. He indicates
15 it then took the BIA an "additional 7 months to adjudicate the merits of his case." *Id.* Petitioner
16 argues that "the Court of Appeals for the Ninth Circuit lost it's [sic] jurisdiction over the case
17 [under case number 24-791], when the BIA granted interim for its failure to issue 'briefing
18 schedule' and 'transcript' to petitioner." Dkt. 13 at 9. Petitioner indicates there is now another
19 case pending in the Ninth Circuit Court of Appeals under case number 24-5264 wherein counsel
20 has been appointed and a motion for stay of removal is pending. *Id.* While not entirely unclear, it
21 appears petitioner is indicating that the BIA granted his motion to reopen, vacated its January 18,
22 2024, decision and reopened his removal proceedings, and then issued a subsequent decision
23 ordering him removed which he has now appealed to the Ninth Circuit under case number 24-

5264. *Id.*; see *Sarr v. Garland*, No. 24-5264 (9th Cir. filed August 27, 2024). The docket in the Ninth Circuit Court of Appeals indicates that this new appeal under case number 24-5264 (apparently appealing the BIA’s subsequent decision issued on July 29, 2024) is in its early stages – Petitioner has been appointed counsel, has moved to stay his removal, and a briefing schedule has been set for the appeal.¹ *Sarr v. Garland*, No. 24-791 (9th Cir. filed August 27, 2024).

DISCUSSION

Petitioner asserts in this action that his continued detention by ICE, which now exceeds 21 months, violates his due process rights under the Fifth Amendment. Dkt. 6. Petitioner requests that the Court order his release from custody or, in the alternative, order an individualized bond hearing. *Id.* The Government argues that the petition should be dismissed for two reasons: (1) because Petitioner has failed to name his immediate custodian and therefore the Court lacks jurisdiction; and (2) because Petitioner's detention is statutorily authorized under 8 U.S.C. § 1226(c) and comports with due process. Dkt. 9. Petitioner has also moved to substitute Bruce Scott, the warden of the NWIPC, as the Respondent. Dkt. 12. The Government has not opposed or otherwise responded to Petitioner’s motion to substitute.

A. Proper Respondent

In his petition, Petitioner names the “Immigration and Customs Enforcement Field Officer Director” as the Respondent. Dkt. 6. The Government moves to dismiss the petition for lack of jurisdiction arguing that the Petitioner has failed to name the proper respondent – the

¹ Although the record before the Court does not appear to contain a copy of Petitioner’s motion to reopen or a copy of the subsequent BIA decision, the record in the two Ninth Circuit cases appears to generally support Petitioner’s assertions and the Government has not disputed or otherwise responded to Petitioner’s assertions regarding this portion of the procedural history.

warden of the facility where the Petitioner is being held. Dkt. 9 at 6-9. Petitioner has separately moved to substitute Bruce Scott, the warden of NWIPC, as the Respondent in this matter. Dkt.

12. The Government did not oppose or otherwise respond to Petitioner's motion to substitute.

“[L]ongstanding practice confirms that in habeas challenges to present physical confinement—‘core challenges’—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held” *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004). In *Doe v. Garland*, the Ninth Circuit recently “affirm[ed] the application of the immediate custodian and district of confinement rules to core habeas petitions filed pursuant to 28 U.S.C. § 2241, including those filed by immigrant detainees.” 109 F.4th 1188 (9th Cir. 2024). Generally, a habeas petitioner's failure to name a proper respondent requires dismissal of the petition for lack of personal jurisdiction. *Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994). However, a court should grant a petitioner “leave to amend his petition to correct this technical deficiency.” *Dubrin v. California*, 720 F.3d 1095, 1100 (9th Cir. 2013); *Le v. Field Off. Dir., San Francisco Field Off.*, No. 1:24-CV-01272, 2024 WL 4534728, at *1 (E.D. Cal. Oct. 21, 2024).

Petitioner is detained at the NWIPC in Tacoma Washington. Pursuant to the Ninth Circuit's recent decision in *Doe*, “[u]nder *Padilla*, [Petitioner] must name his immediate custodian ... as the respondent to his petition.” *Doe*, 109 F.4th at 1199. Petitioner did not originally name the warden of the NWIPC as the Respondent, instead naming the Immigration and Customs Enforcement Field Officer Director. Dkt. 6. But Petitioner has now moved to substitute Bruce Scott, the warden of NWIPC, as the Respondent and the Government did not oppose or otherwise respond to the Petitioner's motion.

1 Accordingly, the Court should deny the Government’s motion to dismiss the petition for
2 lack of jurisdiction (Dkt. 9) and should grant Petitioner’s motion to substitute Bruce Scott as the
3 Respondent (Dkt. 12).

4 **B. Statutory Basis for Petitioner's Detention**

5 Title 8 U.S.C. § 1226 provides the framework for the arrest, detention, and release of
6 non-citizens who are in removal proceedings. 8 U.S.C. § 1226; *see also Demore v. Kim*, 538 U.S.
7 510, 530 (2003) (“Detention during removal proceedings is a constitutionally permissible part of
8 that process.”); *Avilez v. Garland*, 69 F.4th 525, 529-530 (9th Cir. 2023). Section 1226(a) grants
9 DHS the discretionary authority to determine whether a non-citizen should be detained, released
10 on bond, or released on conditional parole pending the completion of removal proceedings,
11 unless the non-citizen falls within one of the categories of criminals described in § 1226(c), for
12 whom detention is mandatory until removal proceedings have concluded. 8 U.S.C. § 1226;
13 *Jennings v. Rodriguez*, 583 U.S. 281, 303-06 (2018). “Subsection C applies throughout the
14 administrative and judicial phases of removal proceedings” *Avilez*, 69 F.4th at 535. This
15 means that individuals who are detained under Section 1226(c) “are not statutorily eligible for
16 release on bond during the judicial phase of the proceedings, except under the narrow
17 circumstances defined by § 1226(c)(2) [where DHS determines release is necessary for witness-
18 protection purposes and the noncitizen will not pose a danger or flight risk.]” *Id.* at 535-36; 8
19 U.S.C. § 1226(c).

20 Section 1226(c) includes any non-citizen who “is deportable by reason of having
21 committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this
22 title.” 8 U.S.C. § 1226(c)(1)(B). In this case, Petitioner was determined to be removable for
23

1 having committed an offense covered in 8 U.S.C. §§ 1227(a)(2)(A)(iii)² and 1127(a)(2)(B)(i)³.
 2 Dkt. 9-2 at 1-2; Dkt. 9-7 at 2. Specifically, Petitioner was convicted of felony conspiracy to
 3 distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 846.⁴

4 As such, Petitioner's detention is statutorily mandated by § 1226(c) until his removal
 5 proceedings have concluded. Accordingly, Petitioner is not statutorily entitled to release or a
 6 bond hearing.

7 C. Due Process

8 Even if Petitioner's continued detention is statutorily permitted under 8 U.S.C. § 1226(c),
 9 it must also comport with due process. Petitioner argues that his ongoing detention has become
 10 prolonged and unreasonable and violates his due process rights, and that he is therefore entitled

11
 12 ² Title 8 U.S.C. § 1227(a)(2)(A)(iii) provides that “[a]ny [noncitizen] who is convicted of an aggravated
 13 felony at any time after admission is deportable.” Title 8 U.S.C. § 1101(a)(43)(B) defines the term
 14 “aggravated felony” to include “illicit trafficking in a controlled substance (as defined in section 802 of
 15 Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18).” Title 18 U.S.C.A.
 16 § 924(c)(2) states the “term ‘drug trafficking crime’ means any felony punishable under the Controlled
 17 Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951
 18 et seq.), or chapter 705 of title 46.”

16 ³ Title 8 U.S.C. § 1227(a)(2)(B)(i) provides that “[a]ny [noncitizen] who at any time after admission has
 17 been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State,
 18 the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title
 19 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana,
 20 is deportable.”

19 ⁴ Title 21 U.S.C. § 841(a)(1) provides “[e]xcept as authorized by this subchapter, it shall be unlawful for
 20 any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent
 21 to manufacture, distribute or dispense, a controlled substance[.]” Title 21 U.S.C. § 846 provides “[a]ny
 22 person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the
 23 same penalties as those prescribed for the offense, the commission of which was the object of the attempt
 or conspiracy.” Sections 841(a)(1) and 846 are felonies punishable under the Controlled Substances Act
 (21 U.S.C. §§ 801 et seq.) and would therefore appear to be drug trafficking crimes as defined in Title 18
 U.S.C.A. § 924(c)(2). *See United States v. Ochoa-Anaya*, No. 1:19-CR-0021, 2024 WL 3967471, at *6
 (E.D. Cal. Aug. 28, 2024) (“Section 846 is part of the Controlled Substances Act (21 U.S.C. §§ 801 et
 seq.) [...] the underlying § 846 violation is a ‘felony punishable under the Controlled Substances Act’ and
 falls within § 924(c)(2)’s definition of a ‘drug trafficking crime.’” The Court notes that Petitioner does not
 appear to challenge the finding that he is deportable under 8 U.S.C. §§ 1227(a)(2)(A)(iii) and
 1127(a)(2)(B)(i) based on his conviction, nor would there appear to be a basis to do so.

1 to release or a bond hearing. Dkt. 6. Respondent argues that Petitioner’s continued detention is
2 reasonable and comports with due process. Dkt. 9.

3 In *Demore*, the Supreme Court rejected a due process challenge to § 1226(c) explaining
4 that Congress drafted § 1226(c) to respond to the high rates of crime and flight by removable
5 non-citizens convicted of certain crimes and holding that “the Government may constitutionally
6 detain deportable [non-citizens] during the limited period necessary for their removal
7 proceedings.” 538 U.S. at 518-21, 526. The Supreme Court emphasized the relatively “brief”
8 nature of the mandatory detention under § 1226(c), which has “a definite termination point” that,
9 in most cases, resulted in detention of less than about five months. *Id.* at 529-30. Justice
10 Kennedy’s concurring opinion, which created the majority, reasoned that under the Due Process
11 Clause, a non-citizen could be entitled to “an individualized determination as to his risk of flight
12 and dangerousness if the continued detention became unreasonable or unjustified.” *Id.* at 532.

13 Since the Supreme Court’s decision in *Demore*, the Ninth Circuit has expressed “grave
14 doubts that any statute that allows for arbitrary prolonged detention without any process is
15 constitutional or that those who founded our democracy precisely to protect against the
16 government’s arbitrary deprivation of liberty would have thought so.” *Rodriguez v. Marin*, 909
17 F.3d 252, 256 (9th Cir. 2018). While it ultimately remains an open question in the Ninth Circuit
18 whether due process requires a bond hearing for noncitizens detained under 8 U.S.C. § 1226(c)⁵,
19 many district courts that have considered the constitutionality of prolonged mandatory
20 detention—including judges in this District—“agree that prolonged mandatory detention pending
21

22 ⁵ See *Avilez*, 69 F.4th at 538 (declining to rule on the question of whether due process required a bond
23 hearing for a non-citizen detained under § 1226(c) and remanding to the district court to consider that
claim); *Martinez v. Clark*, 36 F.4th 1219, 1223 (9th Cir. 2022), *judgment vacated on other grounds*, 144
S.Ct. 1339 (2024) (“Whether due process requires a bond hearing for [noncitizens] detained under §
1226(c) is not before us today. And we take no position on that question.”).

removal proceedings, without a bond hearing, ‘will—at some point—violate the right to due process.’” *Martinez v. Clark*, 2019 WL 5968089, at *6 (W.D. Wash. May 23, 2019), *report and recommendation adopted*, 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019) (quoting *Sajous v. Decker*, 2018 WL 2357266, at *8 (S.D.N.Y. May 23, 2018), and collecting cases); *see also Djelassi v. ICE Field Office Director*, 434 F. Supp. 3d 917, 923-24 (W.D. Wash. 2020) (granting habeas petition and ordering bond hearing for non-citizen whose mandatory detention had become unreasonably prolonged).

In cases involving § 1226(c), where the noncitizen has not previously received a bond hearing, judges in this District have adopted and applied a “multi-factor analysis that many other courts have relied upon to determine whether § 1226(c) detention has become unreasonable.”⁶ *Martinez*, 2019 WL 5968089, at *6-7. Under this analysis, referred to as “the *Martinez* test”, the Court considers the following factors:

(1) the total length of detention to date; (2) the likely duration of future detention; (3) whether the detention will exceed the time the petitioner spent in prison for the crime that made him [or her] removable; (4) the nature of the crimes the petitioner committed; (5) the conditions of detention; (6) delays in the removal proceedings caused by the petitioner; (7) delays in the removal proceedings caused by the government; and (8) the likelihood that the removal proceedings will result in a final order of removal.

Id. at *9.

Accordingly, the Court will apply these factors to evaluate whether Petitioner’s detention has become unreasonable, thereby violating due process.

⁶ The Court notes that where a noncitizen is detained under § 1226(c) and has received at least one prior bond hearing, the Court generally applies the three-factor test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1979). *See, e.g., Ortuno-Perez v. ICE Filed Off. Dir.*, No. 2:23-cv-344-BHS-DWC, 2023 WL 5807305 (W.D. Wash., Aug. 1, 2023) *report and recommendation adopted*, 2023 WL 5802516 (W.D. Wash., Sept. 7, 2023); *Rubin v. United States Immigr. & Customs Enf’t Field Off. Dir.*, No. 2:24-CV-00260-TL-TLF, 2024 WL 3431914, at *2 (W.D. Wash. June 28, 2024), *report and recommendation adopted*, 2024 WL 3431163 (W.D. Wash. July 16, 2024).

1 *1. Length of Detention to Date*

2 The first factor, the length of detention to date, is considered the most important factor in
 3 the analysis. *See, e.g., Martinez*, 2019 WL 5968089, at *9; *Sajous*, 2018 WL 2357266, at *10.
 4 Under this factor, the longer mandatory detention continues under 8 U.S.C. § 1226(c) beyond the
 5 “brief” period authorized in *Demore*, the harder it becomes to justify without conducting an
 6 individualized bond hearing. *See, e.g., Martinez*, 2019 WL 5968089, at *9 (finding nearly 13-
 7 month detention weighed in favor of granting a bond hearing); *Liban M.J. v. Sec’y of Dep’t of*
 8 *Homeland Sec.*, 367 F. Supp. 3d 959, 963-64 (D. Minn. 2019) (“Although there is no bright-line
 9 rule for what constitutes a reasonable length of detention, Petitioner’s [approximately 12-month]
 10 detention has lasted beyond the ‘brief’ period assumed in *Demore*.”); *Sajous*, 2018 WL 2357266,
 11 at *10 (“[D]etention that has lasted longer than six months is more likely to be ‘unreasonable’,
 12 and thus contrary to due process, than detention of less than six months.”); *Juarez v. Wolf*, No.
 13 C20-1660-RJB-MLP, 2021 WL 2323436 (W.D. Wash. May 5, 2021) (finding detention of 14
 14 months weighed in favor of granting a bond hearing).

15 In this case, when Petitioner filed his petition, he had been detained for an ongoing period
 16 of eighteen months and, at this point, his detention has extended to over twenty-one months.
 17 Because Petitioner's detention has extended significantly beyond the “brief” period presumed
 18 reasonable in *Demore*, the Court finds this factor weighs in Petitioner's favor.

19 *2. Likely Duration of Future Detention*

20 The second factor the Court considers is “how long the detention is likely to continue
 21 absent judicial intervention; in other words, the anticipated duration of all removal proceedings
 22 including administrative and judicial appeals.” *Martinez*, 2019 WL 5968089, at *9. Here, the
 23 record shows Petitioner’s petition for review in his *current* pending appeal (under case number

24-5264) was filed with the Ninth Circuit on August 27, 2024. *See Sarr v. Garland*, No. 24-5264 (9th Cir. filed August 27, 2024)

According to the Ninth Circuit's public website, it takes approximately 6 to 12 months from the date of the notice of appeal to oral argument and, following argument, most cases take three months to a year for the Court of Appeals to decide the case. *See* U.S. Court of Appeals for the Ninth Circuit, Frequently Asked Questions, www.ca9.uscourts.gov/content/faq.php (last accessed November 7, 2024).

A review of the docket in Petitioner's current pending appeal (under case number 24-5264) indicates that the opening brief is due January 2, 2025, the answering brief is due February 3, 2025, and the optional reply brief is due within 21 days after service of the answering brief. Thus, briefing is not due to be completed for at least another three months. *see Sarr v. Garland*, No. 24-5264 (9th Cir. filed August 27, 2024). Accordingly, while the Court cannot definitively determine the duration of petitioner's future detention, based upon the current record, it appears likely he will face many more months and potentially years in detention. *See Barraza v. ICE Filed Office Director*, No. C23-1271-BHS-MLP, 2023 WL 9600946, at *6 (W.D. Wash. Dec. 8, 2023) (citing the Ninth Circuit website's timeline for appeals and noting that under this timeline a petitioner who filed his petition for review a few months prior could be facing two years or more of additional time in custody).

The Court notes that the Government, in their motion to dismiss, argues that the only issue remaining to be decided with respect to Petitioner's immigration proceedings is the Government's motion to dismiss filed with respect to Petitioner's appeal under case number 24-791 and that, therefore, this factor should weigh in the Government's favor. Dkt. 9 at 17. But the record shows that that the appeal under case number 24-791 was dismissed on October 22, 2024,

1 for lack of jurisdiction. *Sarr v. Garland*, No. 24-791 (9th Cir. filed Feb. 14, 2024), ECF 19. The
2 Court of Appeals found the BIA's January 18, 2024, order (which was on appeal in case number
3 24-791) was no longer a final order of removal because the decision was vacated by the BIA's
4 February 14, 2024, decision. *Id.* It appears that the Petitioner's petition for review of the
5 subsequent BIA order, issued on July 29, 2024, was filed with the Ninth Circuit on August 27,
6 2024 (under case number 24-5264). *See Sarr v. Garland*, No. 24-5264 (9th Cir. filed August 27,
7 2024). The Government was or should have been aware of this new appeal (and its potential
8 bearing on this factor of the *Martinez* test) when it filed the motion to dismiss this case but failed
9 to address the current appeal entirely. The Government also had the opportunity to address this
10 issue by filing a reply responding to the Petitioner's arguments regarding this subsequent appeal
11 but again failed to do so.

12 Accordingly, on the current record, the Court finds this factor weighs in favor of
13 Petitioner.

14 3. *Criminal History*

15 Under the third and fourth factors, the Court reviews the length of detention compared to
16 the time Petitioner spent in prison for the crime that made him removable and the nature of his
17 crime. *Martinez*, 2019 WL 5968089, at *9; *Cabral v. Decker*, 331 F. Supp. 3d 255, 262
18 (S.D.N.Y. 2018). These factors are considered because they are relevant to whether the detainee
19 is a danger to the community or a risk of flight such that a bond hearing would be futile. *See*
20 *Cabral*, 331 F. Supp. 3d at 262.

21 Here, Petitioner's criminal conviction for conspiracy to distribute methamphetamine
22 resulted in a 24-month sentence, but he was ultimately confined for approximately 16 months.
23 Dkt. 6 at 17-18. At this point, the length of Petitioner's detention has exceeded the amount of

1 time he spent in prison for the crime he committed by several months. Although Petitioner's
2 detention has not yet exceeded his original criminal sentence of 24 months, given the status of
3 his appeal in the Ninth Circuit, it appears very likely that it will. Accordingly, the Court finds
4 this third factor weighs in Petitioner's favor.

5 With respect to the nature of the crime, Petitioner was convicted of a serious felony,
6 conspiracy to distribute methamphetamine, and was sentenced to 24 months in prison. The IJ's
7 decision ordering Petitioner removed reflects that during questioning in his removal proceedings,
8 Petitioner "indicated that because of a debt that was owed to him, in order to recoup money, he
9 essentially agreed to take delivery of methamphetamine on multiple occasions over a period of
10 four months. [Petitioner] indicated that this was in the amount of several ounces and then later
11 indicated that the largest shipment that he received was over 200 grams. [Petitioner] then
12 provided this methamphetamine to another individual for him to sell in order to help the
13 [Petitioner] recoup the money that he believed he was owed based on the transaction over a
14 vehicle." Dkt. 9-7 at 2-3. The IJ concluded that "because of the volume of narcotics involved in
15 this case, the [Petitioner's] personal involvement in what is essentially wholesale distribution"
16 that Petitioner had been convicted of a "particularly serious crime making him ineligible for
17 asylum and withholding of removal." *Id.*

18 In his petition Petitioner asserts that "his conviction emanating from a car sales [sic] to a
19 known drug dealer, whom owed Petitioner \$6,000 from a car transaction, which proven hard to
20 recoup, which forced Petitioner to get involved with the drugs, which led to his conviction." Dkt.
21 6 at 17-18. He further asserts that although he "made 129 phone calls to his con-conspirators
22 95% of the promises to meet resulted in nothing." *Id.*

1 Regardless of Petitioner’s claimed rationale for his actions, Petitioner committed a
 2 serious felony involving distribution of a controlled substance, and the Court finds the fourth
 3 factor weighs in favor of the Government.⁷ *See Juarez*, 2021 WL 2323436, at *6 (Concluding
 4 that petitioner’s conviction for Possession of a Controlled Substance (methamphetamine) and
 5 Delivery of a Controlled Substance (methamphetamine) and 34 month sentence was sufficiently
 6 significant for the “nature of the crime” factor to weigh in favor of the Government).

7 4. *Conditions of Detention*

8 Under the fifth factor, the Court considers the conditions of Petitioner’s detention at the
 9 facility where he is detained. *Martinez*, 2019 WL 5968089, at *9. “The more that the conditions
 10 under which the [non-citizen] is being held resemble penal confinement, the stronger [the]
 11 argument that he is entitled to a bond hearing.” *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 860
 12 (D. Minn. 2019) (citation and internal quotations omitted); *Juarez*, 2021 WL 2323436, at *6.

13 a. *Petitioner’s Allegations*

14 Petitioner asserts that the conditions where he is detained at NWIPC are similar or
 15 possibly worse than he experienced at penal institutions. Dkt. 6 at 18-24. In support of his
 16 argument, Petitioner cites to a decision from this district from 2020, *Katlong v. Barr*. Dkt. 6 at
 17 18-24 (citing *Katlong v. Barr*, No. C20-0846-RSL-MAT, 2020 WL 7048530, at *4 (W.D. Wash.
 18 Oct. 30, 2020), *report and recommendation adopted*, No. C20-0846-RSL-MAT, 2020 WL
 19 7043580 (W.D. Wash. Dec. 1, 2020)). In *Katlong* the Court, in evaluating the conditions of
 20 confinement factor under the *Martinez* test, determined that:

21 The evidence establishes at least the following. The NWIPC is a private detention facility
 22 run by The GEO Group, Inc. (“GEO”), an independent contractor with ICE that provides
 the facility, management, personnel, and services for 24-hour supervision of the detainees
 in ICE custody at the NWIPC. The NWIPC has the capacity to house 1,575 detainees and

23 ⁷ Petitioner appears to acknowledge that this fourth factor weighs “slightly” in Respondent’s favor. Dkt. 6 at 18.

1 historically often operates near capacity. There are 21 housing units, one of which
2 includes an Administrative Segregation Unit and a Disciplinary Management Unit.
3 Detainees are housed according to classification level, and detainees of different
4 classification levels may not ordinarily be housed together in the same housing unit. Male
5 and female detainees are housed in separate units. Most movement within the facility is
6 unit-specific, and detainees are allowed access to a small outdoor area for one hour a day.
7 These conditions are “similar ... to those in many prisons and jails.” *Jennings*, 138 S. Ct.
8 at 861 (Breyer, J., dissenting) (determining that immigration detainees were held in
9 circumstances similar to many penal institutions); *see also Guerrero-Sanchez v. Warden*
10 *York Cnty. Prison*, 905 F.3d 208, 220 n.9 (3d Cir. 2018) (“[T]he reality [is] that merely
11 calling a confinement ‘civil detention’ does not, of itself, meaningfully differentiate it
12 from penal measures.”) (quoted source omitted). Accordingly, this factor weighs in
13 Petitioner’s favor.

14 *Katlong*, 2020 WL 7048530, at *4.

15 Petitioner argues that the conditions of confinement at the NWIPC have not improved
16 since the *Katlong* case but have, instead, gotten worse. Dkt. 6 at 18-24. Specifically, Petitioner
17 notes that detainees are denied access to the internet pursuant to GEO policy. *Id.* He indicates
18 there is a memo stating that the law library officer may not utilize the internet to do research for
19 any detainee and only the provided paper-based publications and Lexis Nexis are available for
20 detainee use. *Id.* Petitioner contends that this “effectively prohibits detainees from representing
21 themselves in immigration proceedings as many detainees lack the financial resources.” *Id.* He
22 contends this policy interferes with detainees’ access to evidence such as articles, newspaper
23 articles, photos to use in their defense in removal proceedings. *Id.* He also argues this policy
prevents detainees from obtaining relevant information within the country of removal in order to
obtain relief under the Convention Against Torture. *Id.*

Petitioner further argues that incoming detainee mail is photocopied including family
portraits and legal mail and that such measures are similar to those in prisons and jails. *Id.*
Petitioner also alleges there are no contact visits at NWIPC unless specifically approved in
emergency situations or for detainees getting removed, visits only last for about an hour,

1 detainees are subject to “frequent and unannounced searches... [and]... GEO staff utilize a ‘pat
2 down’ search as you move from a unit to other areas of the facility and back.” *Id.*

3 Petitioner also contends the environment is unsanitary noting that the restroom stall #3
4 and 4 in Petitioner’s pod have mold in them and restroom # 7 sometimes overflows with fecal
5 matter. *Id.* He alleges he is also subjected to “lack of proper medical care and medicines;
6 inadequate food; energy dense meals (high-fat, high-calorie foods); infringement of privacy;
7 torturous florescent lights that remain on 24 hours and seven days a week (causing severe vision
8 impairment and hamper[ing] detainees’ sleep and sanity ultimately causing hopelessness);
9 overcrowding (less privacy, less access to mental and physical healthcare), including deaths in
10 custody.” *Id.*

11 Petitioner alleges on one occasion, on May 19, 2024, a detainee attempted to commit
12 suicide and GEO staff used an un-sanitized mop bucket and mop head to clean up a substantial
13 amount of blood for two weeks and that this same equipment was used to clean the detainees’
14 living areas. *Id.*

15 Petitioner also alleges detainees are exposed to bird feces and maggots on a daily basis
16 when utilizing the “indoor rec” and that this is potentially harmful. *Id.*

17 *b. The Government’s Arguments*

18 The Government, in its motion to dismiss, contends that it is improper for the Court to
19 consider the conditions of confinement in considering a 28 U.S.C. § 2241 habeas corpus petition,
20 citing *Pinson v. Carvajal*, 69 F.4th 1059 (9th Cir. 2023). The Government also submits a
21 declaration from Ryan Jennings, a Supervisory Detention and Deportation Officer, with the DHS
22 ICE Enforcement and Removal Operations (“ERO”). Dkt. 9-1 (Decl. of Ryan Jennings).

1 In his declaration, Mr. Jennings states that the detained population at NWIPC has
2 dropped significantly and has not been near capacity for years and is generally less than 50%
3 capacity. *Id.* He indicates that currently the detained population at NWIPC is approximate 600
4 detainees. *Id.* Mr. Jennings acknowledges that detainees do not have unrestricted access to all
5 internet but asserts that they do have access to online legal resources at the law library and that
6 each detainee is provided a list of local free or reduced cost legal organizations/individuals that
7 can assist detainees in legal matters. *Id.* He indicates on August 27, 2024, he went to Petitioner's
8 unit to check the conditions of the stalls and observed some discoloration but no mold or
9 overflowing toilets. *Id.* He states he was told by a GEO officer that the toilets are routinely
10 cleaned and in good working order. *Id.*

11 Mr. Jennings states that detainees at NWIPC have free access to medical care on a daily
12 basis through ICE Health Services Corps with providers at NWIPC. *Id.* He states that for
13 necessary medical care that IHSC is not equipped to handle, referrals are made to outside
14 providers. *Id.* Mr. Jennings notes that Petitioner was seen in June and July 2014 by IHSC and
15 that he was referred out for an optometry appointment which took place on August 30, 2024, and
16 for which he obtained a prescription for eyeglasses. *Id.*

17 Mr. Jennings states that he was advised by GEO that all staff are trained on cleaning up
18 Blood Borne Pathogens (BBP) and that the GEO officer involved in the blood cleanup described
19 by Petitioner first cleaned the blood with cleaning solution and paper towels prior to mopping the
20 area. *Id.* However, after concerns were reported by detainees, the mop and bucket were replaced.
21 *Id.*

22 Mr. Jennings states that he was advised by GEO that the menu for detainees at NWIPC is
23 certified by a nutritionist and is about 3,000 calories per day. *Id.* He indicates the lights in each

1 detained unit are dimmed at night and the lights in the restroom area and doorway are left on for
2 safety. *Id.*

3 Mr. Jennings states that GEO responded to a report of a bird's nest in the outdoor fenced
4 recreation area by cleaning the area and checking it daily, but that removal of the bird nest was
5 not performed out of concern for potentially violating federal law. *Id.*

6 *c. Petitioner's Response*

7 In response to the Government's motion to dismiss, Petitioner submits a declaration
8 largely reiterating the allegations in his petition. Dkt. 14. He also raises for the first-time
9 allegations that on a few occasions the drinking water has been brown, that he has experienced
10 some delays in medical treatment for his "chronic hip injury" and for "chronic constipation" and
11 that he witnessed blood being improperly cleaned on two other occasions. *Id.* Petitioner also
12 acknowledged that the lights in the living unit are dimmed at night but states that they still
13 interfere with his sleep. *Id.* Petitioner also appears to allege he believes the lights have caused the
14 high astigmatism in his eyes. *Id.* Petitioner also submits declarations from several other detainees
15 at NWIPC that echo Petitioner's statements regarding the toilet that sometimes overflowing,
16 concerns about possible mold on two of the doors in the bathroom, and inadequacy of the
17 cleaning, food, and healthcare. Dkts. 15, 16, 17, 18, 19, 20, 21.

18 *d. Analysis of Relevant Conditions Under Martinez*

19 Petitioner asserts that the conditions where he is detained at NWIPC are similar or
20 possibly worse than he experienced at penal institutions. Specifically, Petitioner alleges that the
21 same restrictions at the NWIPC cited by the Court in *Katlong* have not changed or improved.
22 Petitioner cites specifically to the findings in *Katlong* that: the NWIPC has the capacity to house
23 1,575 detainees and historically often operates near capacity; it contains housing units including

1 an Administrative Segregation Unit and a Disciplinary Management Unit; detainees are housed
2 according to classification level, and detainees of different classification levels may not
3 ordinarily be housed together in the same housing unit; male and female detainees are housed in
4 separate units; most movement within the facility is unit-specific; and detainees are allowed
5 access to a small outdoor area for one hour a day.

6 The Government submits evidence disputing only one of these conditions - that NWIPC
7 is operating near capacity – asserting instead that the facility has not been operating near
8 capacity for several years and has instead generally been operating at less than 50% capacity. But
9 the Government does not dispute that the other restrictions -- which the Court in *Katlong* found
10 made the conditions of confinement factor weigh in petitioner’s favor -- remain in effect.

11 The Government also does not submit evidence disputing Petitioner’s allegations that
12 incoming detainee mail, including family portraits and legal mail, is photocopied, that there are
13 no contact visits unless specifically approved in emergency situations or for detainees getting
14 removed, that visits only last for about an hour, and detainees are subject to frequent and
15 unannounced searches, and staff utilize a “pat down” search as detainees move from a unit to
16 other areas of the facility and back. Nor does the Government directly refute Petitioner’s
17 assertion that the conditions where he is detained at NWIPC are similar or possibly worse than
18 those he experienced at penal institutions.

19 Accordingly, based upon the record before the Court, the Court finds this factor weighs in
20 Petitioner’s favor. *See Juarez*, 2021 WL 2323436, at *6 (concluding fifth factor favored the
21 petitioner given allegations regarding “restrictions on privacy and autonomy” and “a focus on
22 punitive discipline” at NWIPC); *Anyanwu v. United States Immigr. & Customs Enft Field Off.*
23 *Dir.*, No. 2:24-CV-00964-LK-GJL, 2024 WL 4627343, at *7–8 (W.D. Wash. Sept. 17, 2024),

1 *report and recommendation adopted sub nom. Anyanwu v. ICE Field Off. Dir.*, No. C24-0964
 2 TSZ, 2024 WL 4626381 (W.D. Wash. Oct. 30, 2024) (finding petitioner’s evidence that
 3 “restrictions placed on his movements and conduct at NWIPC are similar to those restrictions
 4 imposed in penal institutions” sufficient for this factor to weigh in petitioner’s favor under
 5 *Martinez* test).

6 *e. Analysis of Conditions as Separate Claim Under Fifth Amendment*

7 Although somewhat unclear, Petitioner also appears to argue that his conditions of
 8 confinement at NWIPC are so severe that they independently violate the Fifth Amendment and
 9 entitle him to immediate release.

10 The Court notes that generally, challenges to the legality or duration of confinement are
 11 pursued in a habeas proceeding, *see Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979), while
 12 challenges to conditions of confinement are pursued in a civil rights action, *see Badea v. Cox*,
 13 931 F.2d 573, 574 (9th Cir. 1991). Thus, this district court has found in the past that a habeas
 14 petitioner’s challenges to conditions of confinement were not properly pursued in an action
 15 proceeding under 28 U.S.C. § 2241. *See, e.g., Calderon-Rodriguez v. Wilcox*, 374 F. Supp. 3d
 16 1024, 1038 (W.D. Wash. 2019) (finding noncitizen's claim in his 28 U.S.C. § 2241 petition that
 17 his detention, “given its length, multiple transfers, housing among criminal detainees and
 18 prisoners, and 70 days in solitary confinement,” had “crossed the line into punishment[,]” did not
 19 belong in an immigration habeas action) (citing *Badea*, 931 F.2d at 574).

20 However, as noted in a recent decision from this district court, “this Court has, within the
 21 context of immigration habeas proceedings, adjudicated Fifth Amendment conditions of
 22 confinement claims related to the COVID-19 pandemic.” *Doe v. Bostock*, No. C24-0326-JLR-
 23 SKV, 2024 WL 3291033, at *5 (W.D. Wash. Mar. 29, 2024), *report and recommendation*

1 *adopted*, No. C24-0326JLR-SKV, 2024 WL 2861675 (W.D. Wash. June 6, 2024) (citing *Juarez*
 2 *v. Asher*, 556 F. Supp. 3d 1181, 1187-88 (W.D. Wash. 2021) (addressing Fifth Amendment
 3 claims regarding the right to reasonably safe conditions), *Ortiz v. Barr*, C20-0497-RSM-BAT,
 4 2020 WL 13577427, at *6-7 (W.D. Wash. Apr. 10, 2020) (addressing Fifth Amendment claim
 5 that detention amounted to punishment), *Dawson v. Asher*, C20-0409-JLR-MAT, 2020 WL
 6 1704324, at *8-9 (W.D. Wash. Apr. 8, 2020) (explaining the circumstances under which the
 7 Court undertook consideration of COVID-19-related conditions of confinement claims in
 8 petitions brought under 28 U.S.C. § 2241)).

9 In *Dawson*, the Court explained that:

10 The United States Supreme Court has not yet resolved the question of whether a
 11 conditions of confinement claim may be brought in the form of a petition for a writ of
 12 habeas corpus. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6, 99 S.Ct. 1861, 60 L.Ed.2d 447
 13 (1979) (“Thus, we leave to another day the question of the propriety of using a writ of
 14 habeas corpus to obtain review of the conditions of confinement, as distinct from the fact
 15 or length of the confinement itself.”). The majority of federal circuit courts allow
 16 detainees to challenge their conditions of confinement via a habeas petition. *See Aamer v.*
 17 *Obama*, 742 F.3d 1023, 1036-37 (D.C. Cir. 2014) (citing *United States v. DeLeon*, 444
 18 F.3d 41, 59 (1st Cir. 2006); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008);
 19 *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242 & n.5 (3d Cir. 2005); *McNair v.*
 20 *McCune*, 527 F.2d 874, 875 (4th Cir. 1975); *Adams v. Bradshaw*, 644 F.3d 481, 482-83
 21 (6th Cir. 2011)). The Ninth Circuit has not yet decided the issue. *See Nettles v. Grounds*,
 22 830 F.3d 922, 931 (9th Cir. 2016) (holding that if a state prisoner’s claim “would not
 23 necessarily spell speedier release,” it does not lie at “the core of habeas corpus,” and must
 be brought, if at all, under 42 U.S.C. § 1983; but explicitly stating that the Ninth Circuit
 would not address how this standard “applies to relief sought by prisoners in federal
 custody”).

Nevertheless, a three-judge panel on the Ninth Circuit recently transferred to this
 district several emergency motions in other matters that the Ninth Circuit construed as
 habeas petitions. ... In those emergency motions, like Petitioners’ TRO motions here, the
 detainees challenge their detention at the NWDC based on conditions that allegedly
 increase the risk of COVID-19 infection. ... Like the Petition before this court, the
 transferred petitions challenge the conditions of confinement, not the fact or duration of
 confinement. *See generally Almeida*, No. C20-0490RSM-BAT, *Almeida Pet.* (Dkt. # 1)

1 (W.D. Wash. Mar. 31, 2020); *Patel*, No. C20-0488RSM-BAT, Patel Pet. (Dkt. # 1)
 2 (W.D. Mar. 31, 2020); *Pablo*, No. C20-489RSM-BAT, Pablo Pet. (Dkt. # 1) (W.D.
 3 Wash. Mar. 31, 2020).

4 The Ninth Circuit’s transfer orders holding that this district court should consider
 5 the transferred emergency motions as habeas petitions are unpublished, and therefore the
 6 transfer orders do not definitively resolve this unsettled area of law. ... Nevertheless,
 7 because both the transferred emergency motions are similar to present Petition, this court
 8 will follow the Ninth Circuit's direction in the transfer orders—to adjudicate the
 9 emergency motions as petitions for writs of habeas corpus under 28 U.S.C. § 2241—and
 10 consider the present Petition under the rubric of 28 U.S.C. § 2241 as well.

11 *Dawson*, 2020 WL 1704324, at *8-9.

12 Respondent cites to the Ninth Circuit’s recent decision in *Pinson v. Carvajal*, 69 F.4th
 13 1059 (9th Cir. 2023) in arguing that Petitioner’s conditions of confinement claims are not
 14 properly considered in a § 2241 habeas petition. *Id.* In *Pinson*, the Ninth Circuit determined that
 15 a convicted prisoner’s conditions of confinement claims raised in a § 2241 habeas petition did
 16 not sound in habeas and were therefore properly dismissed for lack of jurisdiction. *Id.* However,
 17 *Pinson* dealt with a habeas challenge to conditions of confinement brought by prisoners who had
 18 been convicted, and thus did not directly address this issue in the context of civil immigration
 19 detention. *Id.*

20 While the law is unclear as to whether Petitioner’s claims may be properly considered in
 21 a 28 U.S.C. § 2241 petition, even assuming, without deciding, that Petitioner could raise these
 22 claims, he fails to demonstrate he is entitled to relief on this basis.

23 *i. Right to Reasonably Safe Conditions*

“[W]hen the State takes a person into its custody and holds him there against his will, the
 Constitution imposes upon it a corresponding duty to assume some responsibility for his safety
 and general well-being.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–
 200 (1989). The government violates the Due Process Clause if it fails to provide civil detainees

1 with “food, clothing, shelter, medical care, and reasonable safety.” *Id.* at 200. In order to
 2 establish such a claim, Petitioner must show:

- 3 (i) The defendant made an intentional decision with respect to the conditions
 under which the plaintiff was confined;
- 4 (ii) Those conditions put the plaintiff at substantial risk of suffering serious harm;
- 5 (iii) The defendant did not take reasonable available measures to abate that risk,
 even though a reasonable officer in the circumstances would have appreciated the
 high degree of risk involved—making the consequences of the defendant's
 6 conduct obvious; and
- 7 (iv) By not taking such measures, the defendant caused the plaintiff's injuries.

8 *Castro*, 833 F.3d at 1071; *see also Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020)
 9 (addressing reasonable safety claim raised by immigration detainees during the COVID-
 10 19 pandemic).

11 With respect to the third element, the Government's conduct must be “objectively
 12 unreasonable, a test that will necessarily ‘turn on the facts and circumstances of each particular
 13 case.’” *Castro*, 833 F.3d at 1071 (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015))
 14 (alterations and internal quotation marks omitted). Objective unreasonableness requires “more
 15 than negligence but less than subjective intent—something akin to reckless disregard.” *Castro*,
 16 833 F.3d at 1071 (quoted source omitted). “To satisfy the fourth element, a plaintiff need only
 17 prove a ‘sufficiently imminent danger[],’ because a ‘remedy for unsafe conditions need not
 18 await a tragic event.’” *Roman*, 2020 WL 6040125, at *6, 977 F.3d 935 (quoting *Helling v.*
 19 *McKinney*, 509 U.S. 25, 33–34 (1993)).

20 Petitioner contends that the Government has subjected him to unsanitary conditions
 21 noting that two of the restroom stalls in Petitioner's pod appear to have mold in them and one of
 22 the toilets sometimes overflows with fecal matter. He alleges he is also subjected to lack of
 23 proper medical care and medicines; inadequate food; energy dense meals (high-fat, high-calorie
 foods); infringement of privacy; torturous florescent lights that remain on 24 hours and seven

1 days a week; overcrowding; and that deaths have occurred in custody. Petitioner alleges on one
2 occasion a detainee attempted to commit suicide and GEO staff did not properly sanitize or clean
3 the area. Petitioner also alleges detainees are exposed to bird feces and maggots on a daily basis
4 when utilizing the “indoor rec” and that this is potentially harmful.

5 Many of Petitioner’s allegations, in particular his allegations related to dissatisfaction
6 with the food, inadequate medical care, overcrowding, and exposure to bird feces and maggots in
7 the rec area are too generalized and conclusory to establish a Fifth Amendment violation.
8 Furthermore, the Government has submitted evidence specifically refuting some of Petitioner’s
9 generalized allegations and demonstrating that measures have been taken to address the other
10 issues raised by Petitioner. Specifically, the Government has submitted evidence that the
11 detained population at NWIPC has been operating below capacity for years and is generally
12 operating at less than 50% capacity; the food provided is certified by a nutritionist and is about
13 3,000 calories per day; Officer Jennings inspected the bathrooms in question and found
14 discoloration but not mold and no overflowing toilets⁸; Petitioner has access to medical care and
15 has been seen by medical and referred to an outside provider related to his eye issues; GEO staff
16 are trained in cleaning Blood Borne Pathogens and that officers cleaned the area with cleaning
17 solution and towels prior to mopping, and then replaced the mop and bucket when concerns were
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23 ⁸ The Court also notes that an occasionally overflowing toilet (particularly where it is not the only toilet available) without more would also not rise to the level of a Fifth Amendment violation.

1 voiced by detainees; the lights are dimmed at night in the living units⁹; GEO staff responded to
 2 reports of a birds nest in the rec area by cleaning the area and checking it daily.¹⁰

3 The Court concludes that on this record Petitioner has not demonstrated that he faces a
 4 substantial risk of serious harm due to the current conditions of his detention and that the
 5 Government has failed to take reasonable measures to abate any such risk. Accordingly,
 6 Petitioner has not established a separate independent Fifth Amendment violation on this basis.

7 *ii. Conditions Amounting to Punishment*

8 Petitioner also appears to argue that his confinement amounts to unconstitutional
 9 punishment.

10 To evaluate the constitutionality of a pretrial or civil detention condition under the Fifth
 11 Amendment, a district court must determine whether those conditions “amount to punishment of

12
 13 ⁹ The Court notes that in his response to the Government’s evidence Petitioner acknowledges that the
 14 lights are in fact dimmed at night but argues that they are not sufficiently dimmed and still affect his
 15 sleep. Dkt. 13. But Petitioner’s general allegation that the dimmed lights still affect his sleep to some
 16 degree and his speculative assertion that he believes the lighting has affected his eyesight are not
 17 sufficient, without more, to establish a constitutional violation.

18 ¹⁰ The Court notes that in response to the Government’s motion to dismiss, Petitioner raises several
 19 allegations for the first-time including that on a few occasions the drinking water has been brown, that he
 20 has experienced some delays in medical treatment for his “chronic hip injury” and for “chronic
 21 constipation” and that he has witnessed blood being improperly cleaned on two other occasions. Dkt. 13.
 22 Petitioner also submits declarations from several other detainees at NWIPC that echo Petitioner’s
 23 statements regarding the toilet that sometimes overflows, concerns about possible mold on two of the
 doors in the bathroom, and inadequacy of the cleaning, food and healthcare. Dkts. 15, 16, 17, 18, 19, 20,
 21. These new arguments, presented for the first time in response to the Government’s motion to dismiss,
 are not properly before the Court. *See See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.2007) (“The
 district court need not consider arguments raised for the first time in a reply brief.”); *Czapla v. Dep’t of*
Corr., No. C11-317-JCC-JPD, 2011 WL 6884679, at *5 (W.D. Wash. Aug. 8, 2011), *report and*
recommendation adopted, No. C11-0317-JCC, 2011 WL 6887123 (W.D. Wash. Dec. 29, 2011) (“To the
 extent that [the habeas] petitioner seeks to add completely new claims in his reply to respondent’s answer
 ..., those claims are not properly before the Court because they were raised for the first time in the reply
 brief.”). However, even if the Court were to consider these new allegations, they fail to establish a
 violation of the Fifth Amendment as applied to Petitioner.

1 the detainee.” *Bell*, 441 U.S. at 535; *see also Kingsley*, 576 U.S. at 398. Punishment may be
2 shown through an express intent to punish or a restriction or condition that “is not reasonably
3 related to a legitimate governmental objective.” *Bell*, 441 U.S. at 539; *see also Kingsley*, 576
4 U.S. at 398 (clarifying that “a pretrial detainee can prevail by providing only objective evidence
5 that the challenged governmental action is not rationally related to a legitimate governmental
6 objective or that it is excessive in relation to that purpose”).

7 Here, Petitioner presents no evidence of an express intent to punish. Furthermore, the
8 Supreme Court has recognized “a legitimate government interest in ensuring noncitizens appear
9 for their removal or deportation proceedings and protecting the community from harm.” *Bryan v.*
10 *ICE Field Off. Dir.*, No. 221CV00154BHSTLF, 2021 WL 4556148, at *4 (W.D. Wash. June 14,
11 2021), *report and recommendation adopted*, 2021 WL 4552442 (W.D. Wash. Oct. 5, 2021)
12 (citing *Jennings v. Rodriguez*, 583 U.S. 281, 285-88 (2018), *Demore*, 538 U.S. at 520–22,
13 *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001)).

14 As discussed above, Petitioner fails to demonstrate the current conditions of his detention
15 place him at substantial risk of serious harm. And on the current record, the Court concludes
16 Petitioner has failed to present “objective evidence the challenged governmental action[s are] not
17 rationally related to a legitimate governmental objective or that [they are] excessive in relation to
18 that purpose.” *Kingsley*, 576 U.S. at 398. Accordingly, the Court finds Petitioner has also not
19 established a separate independent Fifth Amendment violation on this basis.

20 Finally, Petitioner fails to demonstrate that even if the alleged Fifth Amendment
21 violations could be established, that they would warrant or require immediate release. Rather, as
22 this district court has previously held, “[e]ven if Petitioner could show a Fifth Amendment
23 violation, he does not establish that such a violation would justify immediate release, as opposed

1 to injunctive relief that would leave him detained while ameliorating any unconstitutional
2 conditions at the NWIPC.” *Ortiz v. Barr*, No. C20-497-RSM-BAT, 2020 WL 13577427, at *7
3 n.8 (W.D. Wash. April 10, 2020); *accord Doe v. Bostock*, 2024 WL 3291033, at *8.

4 5. *Delays in Removal Proceedings*

5 Under the sixth and seventh factors, the Court considers “the nature and extent of any
6 delays in the removal proceedings caused by the petitioner and the government, respectively.”
7 *Martinez*, 2019 WL 5968089, at *10. “Petitioner is entitled to raise legitimate defenses to
8 removal ... and such challenges to his removal cannot undermine his claim that detention has
9 become unreasonable.” *Liban M.J.*, 367 F. Supp. 3d at 965 (citing *Hernandez v. Decker*, 2018
10 WL 3579108, at *9 (S.D.N.Y. July 25, 2018) (“[T]he mere fact that a noncitizen opposes his
11 removal is insufficient to defeat a finding of unreasonably prolonged detention, especially where
12 the Government fails to distinguish between bona fide and frivolous arguments in opposition.”)).
13 Thus, this factor only weighs against a petitioner when he “has ‘substantially prolonged his stay
14 by abusing the processes provided’” but not when he “simply made use of the statutorily
15 permitted appeals process.” *Hechavarria v. Sessions*, 891 F.3d 49, 56 n.6 (2d Cir. 2018) (quoting
16 *Nken v. Holder*, 556 U.S. 418, 436 (2009)). With respect to the Government, “[i]f immigration
17 officials have caused delay, it weighs in favor of finding continued detention unreasonable
18 Continued detention will also appear more unreasonable when the delay in the proceedings was
19 caused by the immigration court or other non-ICE government officials.” *Sajous*, 2018 WL
20 2357266, at *11.

21 Both parties argue that the other party should be charged for delays in the case. The
22 Government argues that Petitioner has delayed proceedings by requesting several continuances at
23 the beginning of his removal proceedings to seek counsel and to prepare his materials as well as

1 by appealing decisions finding him removable. Dkt. 9. However, absent evidence of bad faith or
2 deliberate delay, these requests for what amounted to relatively brief continuances of a few
3 months to seek counsel and prepare materials should not, in the Court’s opinion, weigh against
4 Petitioner. *See Martinez*, 2019 WL 5968089, at *10 (finding the sixth factor (delays attributable
5 to petitioner) weighed in petitioner’s favor where there was no indication petitioner engaged in
6 deliberate delay tactics but that he merely requested two reasonable continuances (totaling 4-5
7 months) so he could prepare and file a motion to terminate and applications for relief from
8 removal). Furthermore, with respect to Petitioner’s appeals, there is no evidence Petitioner has
9 “substantially prolonged his stay by abusing the processes provided.” *Hechavarria*, 891 F.3d at
10 56 n.6 (quoting *Nken*, 556 U.S. at 436). Rather, based on the record before the Court, it appears
11 Petitioner has “simply made use of the statutorily permitted appeals process.” *Id.* Accordingly,
12 the Court finds this sixth factor weighs in favor of Petitioner.

13 Petitioner asserts that he was never issued a briefing schedule or transcript prior to the
14 dismissal of his initial appeal to the BIA of the IJ’s August 30, 2023, order of removal. Dkt. 6 at
15 15-16. Petitioner indicates that despite this fact the BIA issued a decision affirming the IJ’s
16 decision on January 18, 2024. *Id.* Because of this he indicates he moved to reopen the BIA’s
17 decision and it then took the BIA an “extra 7 months to adjudicate the merits of this case[.]” *Id.*
18 The Government did not address Petitioner’s argument in its response and, although the record is
19 not entirely clear, the record before the Court does appear to reflect that the January 18, 2024,
20 BIA decision was vacated, that a new decision was issued seven months later in July 2024, and
21 that the second BIA decision is now on appeal in the Ninth Circuit.

22 Although there is no indication in the record that this delay was tactical or deliberate on
23 the part of the Government, Courts have found delays caused by the immigration court to be

1 attributable to the Government. *See Martinez*, 2019 WL 5968089, at *10 (finding delays
2 stemming from the immigration court’s crowded docket attributable to the Government);
3 *see Sajous*, 2018 WL 2357266, at *11 (“the operative question should be whether the
4 [noncitizen] has been the cause of the delayed immigration proceeding and, where the fault is
5 attributable to some entity other than the [noncitizen], the factor will weigh in favor of
6 concluding that continued detention without a bond hearing is unreasonable”); *Durkay v. Decker*,
7 No. 18-2898, 2018 WL 5292130, at *4 (S.D.N.Y. Oct. 25, 2018) (delay caused by immigration
8 court weighed in favor of the petitioner). Furthermore, the Government has not disputed
9 Petitioner’s assertions regarding the cause and nature of this delay. Accordingly, on the current
10 record, the Court finds the seventh factor also favors Petitioner.

11 6. *Likelihood Removal Proceedings Will Result in a Final Order of Removal*

12 Finally, under the eighth factor, the Court considers “the likelihood that the removal
13 proceedings will result in a final order of removal.” *Liban M.J.*, 367 F. Supp. 3d at 965. “In other
14 words, the Court considers whether the noncitizen has asserted any defenses to removal.”
15 *Martinez*, 2019 WL 5968089, at *10; *Sajous*, 2018 WL 2357266, at *11. “Where a noncitizen
16 has not asserted any grounds for relief from removal, presumably the noncitizen will be removed
17 from the United States, and continued detention will at least marginally serve the purpose of
18 detention, namely assuring the noncitizen is removed as ordered.” *Id.* at *10. “But where a
19 noncitizen has asserted a good faith challenge to removal, ‘the categorical nature of the detention
20 will become increasingly unreasonable.’” *Id.* (quoting *Reid v. Donelan*, 819 F.3d 486, 495 (1st
21 Cir. 2016)).

22 There is insufficient information available at this time for the Court to predict whether
23 Petitioner's removal proceedings will result in a final order of removal. It appears the IJ and the

1 BIA have rejected Petitioner’s challenges to his removal, but Petitioner currently has a petition
2 for review pending in the Ninth Circuit. The Court declines to conclude on the current record
3 before the Court whether Petitioner is likely to prevail on his appeal. *See Juarez*, 2021 WL
4 2323436, at *7 (“Petitioner does, however, have a petition for review pending before the Ninth
5 Circuit and this Court is unwilling to conclude, based on the record before it, that the appeal is
6 frivolous or that Petitioner will not ultimately prevail. The Court therefore finds this factor
7 neutral.”).

8 Given the limited information currently available to the Court, the Court finds this factor
9 weighs neutrally.

10 7. *Weighing the Factors*

11 As discussed above, six of the eight factors weigh in Petitioner’s favor, one factor weighs
12 in the Government’s favor, and the remaining factor is neutral. On this record, the Court
13 concludes that the factors in Petitioner’s favor outweigh those favoring the Government.
14 Accordingly, the Court concludes Petitioner’s prolonged mandatory detention under § 1226(c)
15 has become unreasonable such that an individualized bond hearing is required to comport with
16 due process.

17 **D. Bond Hearing**

18 Where the Court has determined that a § 1226(c) detainee has been subjected to
19 unreasonably prolonged detention in violation of due process, this Court has repeatedly found the
20 proper remedy to be a bond hearing conducted in accordance with the requirements of *Singh v.*
21 *Holder*, 638 F.3d 1196 (9th Cir. 2011) wherein the government bears the burden of proving the
22 detainee is a danger or flight risk by clear and convincing evidence. *See, e.g., Anyanwu.*, 2024
23

1 WL 4627343, at *7–8; *Juarez*, 2021 WL 2322823; *Pasillas v. ICE Field Off. Dir.*, No. 21-cv-
2 681-RAJ-MLP, 2022 WL 1127715 (W.D. Wash. Apr. 15, 2022).

3 The Government argues that if the Court orders a bond hearing the burden of proof
4 should be placed upon the Petitioner, citing to *Jennings v. Rodriguez*, 583 U.S. 281 (2018) and
5 *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022).

6 However, as another decision from this district court recently explained: “[although in
7 *Jennings*] the Supreme Court reversed *Singh* and other Circuit decisions that interpreted §
8 1226(c) and similar statutory provisions to include implicit procedural protections ... [f]ollowing
9 *Jennings*, ... this Court and other district courts continue to apply the reasoning in *Singh* to
10 conclude that § 1226(c) detainees are entitled to bond hearings as a matter of constitutional due
11 process rather than implicit statutory guarantees.” *Anyanwu*, 2024 WL 4627343, at *7–8;
12 *Jimenez v. Current or Acting Field Off. Dir., San Francisco Field Off., United States Immigr. &*
13 *Customs Enft*, No. 23-CV-03566, 2024 WL 714659, at *9 (N.D. Cal. Feb. 21, 2024) (concluding
14 that “*Singh*’s holding on the burden of proof was based on constitutional due process principles
15 rather than any interpretation of the statute”); *Juarez*, 2021 WL 2323436, at * 8 (collecting
16 cases); *Gonzalez v. Bonnar*, No. 18-CV-05321, 2019 WL 330906, at *7 (N.D. Cal. Jan. 25,
17 2019) (“[N]early all the courts that have granted habeas petitions in 1226(c) cases post-*Jennings*
18 have held that the government bears the burden of proof by clear and convincing evidence.”)
19 (citation omitted).

20 In *Rodriguez Diaz*, the Ninth Circuit declined to extend the procedural requirements of
21 *Singh* to individuals detained under § 1226(a), finding “existing agency procedures” provided
22 them sufficient protection. 53 F.4th 1189. But in *Rodriguez Diaz*, the detainee was detained
23 under § 1226(a) and thus pursuant to the statute and its implementing regulations, he “received

1 an individualized bond hearing shortly after the start of his detention and had a continuing right
2 to request release on the basis of changed circumstances.” *Jimenez*, 2024 WL 714659, at *8, n. 7;
3 *and see* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1, 1003.19; *Rodriguez Diaz*, 53 F.4th at 1202
4 (noting that § 1226(a) “stands out from the other immigration detention provisions in key
5 respects. Section 1226(a) and its implementing regulations provide extensive procedural
6 protections that are unavailable under other detention provisions, including several layers of
7 review of the agency’s initial custody determination, an initial bond hearing before a neutral
8 decisionmaker, the opportunity to be represented by counsel and to present evidence, the right to
9 appeal, and the right to seek a new hearing when circumstances materially change.”). Thus, it
10 was “only in the context of these procedural protections already afforded to the noncitizens
11 detained under Section 1226(a) that *Rodriguez Diaz* concluded noncitizen detainees had no
12 constitutional right to additional bond hearings based solely on the passage of time.” *Jimenez*,
13 2024 WL 714659, at *8, n. 7; *Rodriguez Diaz*, 53 F.4th at 1202. Accordingly, *Rodriguez Diaz* is
14 distinguishable from the instant case as it did not address the question of whether *Singh*
15 continues to apply to § 1226(c) detainees (and more specifically those who have not had a bond
16 hearing of any kind) on constitutional grounds.

17 Although it appears “the applicability of *Singh* to the constitutional rights of noncitizens
18 detained under § 1226(c) remains an open question in the Ninth Circuit”, *Anyanwu*, 2024 WL
19 4627343, at *7–8, the Ninth Circuit has signaled in other cases that the burden of proof legal
20 standard articulated in *Singh* continues to apply for immigration detainees subject to prolonged
21 detention. *Id.* (citing *Martinez v. Clark*, 36 F.4th 1219, 1230–31 (9th Cir. 2022), *judgment*
22 *vacated on other grounds*, 144 S. Ct. 1339 (2024) (finding the BIA applied the correct legal
23 standard in requiring the Government to prove by clear and convincing evidence that a

1 noncitizen detained under § 1226(c) was a danger to the community); *Aleman Gonzalez v. Barr*
 2 955 F.3d 762, 766 (9th Cir. 2020), *rev'd on other grounds sub nom. Garland v. Aleman*
 3 *Gonzalez*, 596 U.S. 543 (2022) (affirming the district court decision requiring the government to
 4 bear a heightened burden of proof at a bond hearing for a § 1231(a)(6) detainee as a matter of
 5 due process)).

6 The Court also notes that many district courts in the Ninth Circuit, including this Court,
 7 have continued to apply *Singh* to § 1226(c) cases. *See, e.g., Anyanwu*, 2024 WL 4627343, at *7–
 8 8; *Salesh P. v. Kaiser*, No. 22-cv-01785, 2022 WL 17082375 (N.D. Cal. Nov. 17, 2022); *Singh v.*
 9 *Garland*, No. 1:23-cv-01043, 2023 WL 5836048 (E.D. Cal. Sept. 8, 2023); *Durand v. Allen*, No.
 10 3:23-cv-00279, 2024 WL 711607 (S.D. Cal. Feb. 21, 2024).

11 Therefore, the Court finds Petitioner is entitled to a bond hearing where the Government
 12 bears the burden of proving by clear and convincing evidence that Petitioner is a flight risk or
 13 danger to the community.

14 **E. Request for TRO**

15 Petitioner's petition also appears to include a request for a TRO. Dkt. 6 at 30-36.
 16 However, in requesting a TRO, Petitioner seeks the same relief that he requests in the petition –
 17 an order requiring the Government to provide him with a bond hearing or immediately release
 18 from custody. Accordingly, Petitioner's request for a TRO (Dkt. 6) should be DENIED as moot.

19 **CONCLUSION**

20 For the foregoing reasons, the Court recommends that the Government's motion to
 21 dismiss (Dkt. 9) and Petitioner's federal habeas petition (Dkt. 6) should be GRANTED in part
 22 and DENIED in part. Specifically, the Court recommends that Petitioner's request for release
 23 should be DENIED but he should be GRANTED a bond hearing that comports with the

1 procedural requirements of *Singh* within 30 days of an order on this Report and
2 Recommendation. Petitioner's request for a TRO (Dkt. 6) should also be DENIED as moot. The
3 Court further recommends that Petitioner's motion to substitute (Dkt. 12) be GRANTED and that
4 Bruce Scott, the warden of NWIPC, be substituted as the Respondent in this action. A proposed
5 Order accompanies this Report and Recommendation.

6 **OBJECTIONS**

7 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
8 served upon all parties to this suit no later than **December 11, 2024**. The Clerk should note the
9 matter for **December 13, 2024**, as ready for the District Judge's consideration if no objection is
10 filed. If objections are filed, any response is due within 14 days after being served with the
11 objections. A party filing an objection must note the matter for the Court's consideration 14 days
12 from the date the objection is filed and served. The matter will then be ready for the Court's
13 consideration on the date the response is due. The failure to timely object may affect the right to
14 appeal.

15 DATED this 27th day of November, 2024.



18 BRIAN A. TSUCHIDA
19 United States Magistrate Judge
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